

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,)	
)	
Plaintiff and Respondent,)	
)	S015008
v.)	
)	Alameda County
MARK LINDSEY SCHMECK,)	Super. Ct. No. H-9033
)	
Defendant and Appellant.)	
_____)	

THE COURT:

The opinion filed in this matter on August 25, 2005, is modified as follows:

The first sentence of the second full paragraph on 37 Cal.4th at page 286 is modified to read: “Defendant did not object to the prosecutor’s statement or seek an admonition, and no exception to the general requirement of an objection is applicable; to the extent defendant claims the prosecutor committed misconduct by misstating the law, defendant has forfeited this claim on appeal.”

The first full paragraph on 37 Cal.4th at page 295 is modified to read as follows: “We conclude that the trial court did not abuse its discretion in failing to hold a further evidentiary hearing. The trial court is required to hold such a hearing only when the defense adduces evidence demonstrating a ‘strong possibility that prejudicial misconduct has occurred,’ and generally a hearing is unnecessary unless there is a material conflict in the evidence presented by the parties. (*Hedgecock*,

supra, 51 Cal.3d at p. 419.) Even assuming that a conversation occurred between Juror D. N. and the prisoner, whether Juror D. N. spoke to someone was not a material issue in the case, and evidence of any such conversation did not create a likelihood of prejudicial misconduct. Rather, the conversation, if one occurred, was relevant only if Juror D. N. spoke to a third person about the case, and the declaration expressly stated that the juror did not do so. Indeed, the trial court previously had held an evidentiary hearing to investigate assertions that the juror committed misconduct, and found no misconduct. Under these circumstances, the trial court acted within its discretion in declining to hold a second evidentiary hearing. (*People v. Brown* (2003) 31 Cal.4th 518, 582.)”

This modification does not effect a change in the judgment.